Supreme Court, U.S.
FILED
JAN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1152

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

INCOME PROPERTIES, INC., ET AL.,
PETITIONER

vs.

JOHN C. LUNSFORD, ET AL. -- RESPONDENT

ON WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

RESPONSE TO PETITION

FOR WRIT OF CERTIORARI

TOM PYE
Ga. Bar No. 590400
CHESNUT & LIVINGSTON, P.C.
6485 Peachtree Ind. Blvd.
Doraville, Georgia 30360
(404) 458-7606

10 pp

SUPPLEMENTARY LISTING OF PARTIES

The Petition for Writ of Certiorari is filed by "Income Properties, Inc., et al." (Page 1 of Petition). The letter of January 10, 1989 from Glenville Haldi, Esquire, Petitioners' counsel, to Mrs. Loretta S. Ruffin, Assistant Clerk of this Court, states the parties at interest to be: John C. Lunsford, Income Properties, Inc. and Hugh C. Hunter. The Appellants in the Supreme Court of Georgia were Income Properties, Inc., Hugh C. Hunter and Mike E. Hunter. It is believed that Mike E. Hunter may also be a Petitioner in this Court.

The Respondents are named in the caption of the Petition as "John C. Lunsford, et al." In fact, the appellees in the Supreme Court of

Georgia and the Respondents in this Court are John C. Lunsford, Daniel J. Lunsford and William F. Lozier, as Executors of the Estate of Joel Lunsford.

TABLE OF CONTENTS

	Page
SUPPLEMENTAL LISTING OF PARTIES	i
TABLE OF AUTHORITIES	iv
CONCISE STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
1. Dismissal Of The Appeal By The Supreme Court Of Georgia Was Correct	3
2. The Question Presented Is Not Of Federal Constitutional Significance	6
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

CASES

	Page
Betts vs. Brady, 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (overruled on other grounds, Gideon vs. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792	7
Blanton vs. Jones, 230 Ga. 866 (1973)	4
Brown vs. Mississippi, 297 U.S. 278, 80 L. Ed. 682, 56 S. Ct. 461	7
Gideon vs. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792	7
Re: Groban, 352 U.S. 330, 1 L. Ed. 2d 376, 77 S. Ct. 510	8
Jordan vs. Coldwell, 229 Ga. 343, 344 (1972)	4,5
McKinney vs. The State, 187 Ga. App. 702 (1988)	4
Mitchell vs. W. T. Grant Co., 416 U.S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895	7

Mullane vs. Central Hanover Bank & Trust Co.,
339 U.S. 306, 94 L. Ed. 865,
70 S. Ct. 652 8

FEDERAL CONSTITUTION

Fifth Amendment, Constitition of the United States 6

Fourteenth Amendment, Constitution of the United States 7

STATUTES

Official Code of Georgia Annotated (O.C.G.A.) 5-6-38 3

COURT RULES

Rule 17, Rules of the Supreme Court of the United States 3,9

Rule 39, Rules of the Supreme Court of the State of Georgia 5

Rule 43, Rules of the Supreme Court of the State of Georgia 8

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Respondents, John C. Lunsford, Daniel J. Lunsford and William F. Lozier, as Executors of the Estate of Joel Lunsford, herewith make this Response to the Petition for Writ of Certiorari and pray that the same be denied.

CONCISE STATEMENT OF THE CASE

This is a landlord and tenant litigation. A Final Judgment and Decree in favor of Respondents and against Petitioners was entered in the Trial Court (Superior Court of Fulton County, Georgia) on October 19, 1987. On November 25, 1987 (thirty-seven [37] days later) Petitioners filed their Notice of Appeal to the Supreme Court of Georgia.

The Appeal was docketed in the Supreme Court of Georgia on July 19, 1988. On July 22, 1988 Respondents filed in the Supreme Court of Georgia a Motion to Dismiss the Appeal based upon the ground that the Notice of Appeal was not timely filed in the Trial Court. Petitioners filed their Enumerations of Error and Brief in support of their appeal on August 16, 1988, but did not respond to the Motion to Dismiss.

The Supreme Court of Georgia granted the Motion to Dismiss on September 7, 1988, some forty-seven (47) days after the filing of the Motion to Dismiss, and denied Petitioners' Motion for Rehearing on September 22, 1988.

SUMMARY OF ARGUMENT

The Dismissal of Petitioners' Appeal to the Supreme Court of Georgia as being untimely filed was not error. The "Question Presented" by Petitioners is not a matter of Federal Constitutional significance so as to be subject to review under Rule 17 of the Rules of this Court.

ARGUMENT

1.

Dismissal Of The Appeal By The Supreme Court Of Georgia Was Correct.

Under Georgia law a party wishing to appeal from an appealable decision of the Trial Court must do so within thirty (30) days of the entry (filing) of the decision.

"A Notice of Appeal shall be filed within 30 days after entry

of the appealable decision or judgment complained of...." Official Code of Georgia Annotated 5-6-38.

A timely filing of a Notice of Appeal is jurisdictional.

"The proper and timely filing of a Notice of Appeal is an absolute requirement to confer jurisdiction upon the Appellate Court." Jordan vs. Caldwell, 229 Ga. 343, 344 (1972); See also, Blanton vs. Jones, 230 Ga. 866 (1973); and McKinney vs. The State, 187 Ga. App. 702 (1988).

"We hold that the burden is on the party desiring to take the appeal to determine when the judgment is filed in the Trial Court, and the burden is on the party desiring to appeal to file

his Notice of Appeal within the 30-day period or within a duly authorized extension of the 30-day period." Jordan, supra.

Petitioners did not file their Notice of Appeal in the Trial Court within the time required by the statute (30 days) nor did they seek or obtain an extension of time. The dismissal of the appeal was in conformity with the Georgia statute and with judicial precedent.

Rule 39 of the Rules of the Supreme Court of the State of Georgia requires the Brief for the Appellant to be filed within twenty (20) days after the case is docketed unless the time is extended by the Court. In fact, Petitioners requested and obtained an extension of time and were allowed twenty-eight (28) days for filing their Brief. Peti-

tioners' Brief did not refer to the Motion to Dismiss which had been pending for twenty-five (25) days at that time. Neither did Petitioners otherwise respond to the Motion to Dismiss. The Motion was granted and the appeal was dismissed on September 7, 1988, forty-seven (47) days after the Motion was filed. Only then did Petitioners undertake to respond to the Motion to Dismiss by way of a Motion for Rehearing. By failing to respond or object to the Motion to Dismiss in the Supreme Court of Georgia Petitioners waived any right to complain in this Court.

2.

The Question Presented Is Not Of Federal Constitutional Significance.

Petitioners seek review and relief under the Fifth Amendment to the United

States Constitution. The Fifth Amendment is a limitation upon the powers of the Federal Government. It is the Fourteenth Amendment which is a limitation upon the powers of the States. Betts vs. Brady, 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (overruled on other grounds, Gideon vs. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792).

The guarantee of due process viewed in its procedural aspect requires no particular form of procedure. Mitchell vs. W. T. Grant Co., 416 U.S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895.

The procedure by which rights may be enforced and wrongs remedied is particularly a subject of State regulation and control. Brown vs. Mississippi, 297 U.S. 278, 80 L. Ed. 682, 56 S. Ct. 461.

With respect to the Motion to Dismiss filed in the Supreme Court of Georgia, Petitioners were given notice by service of the Motion upon them pursuant to Rule 43 of the Rules of the Supreme Court of the State of Georgia. They were given an opportunity to be heard prior to a ruling upon the Motion but elected to remain silent. Notice and an opportunity to be heard are the basic requirements of procedural due process. Mullane vs. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652.

Respondents' Motion to Dismiss sat unopposed for forty-seven (47) days before it was granted. Nothing about the dismissal of the appeal by the Supreme Court of Georgia is offensive to fundamental principals of liberty and justice. Re: Groban, 352 U.S. 330,

1 L. Ed. 2d 376, 77 S. Ct. 510.

Assuming that Petitioners have a legally arguable issue, such issue is not within those matters which this Court reviews by Writ of Certiorari pursuant to Rule 17.

CONCLUSION

Petitioners were dilatory in filing their original Notice of Appeal. They allowed the Motion to Dismiss filed in the Supreme Court of Georgia to go unopposed. The dismissal of the appeal by the Supreme Court of Georgia was an eminently correct decision. This Court should not grant the Petition for Writ of Certiorari.

Respectfully submitted,

Tom Pye
Attorney for Respondents
Georgia Bar No. 590400

CHESNUT & LIVINGSTON, P.C.
6485 Peachtree Industrial Blvd.
Doraville, Georgia 30360
(404) 458-7606

CERTIFICATE OF SERVICE

This is to certify that I have this date served counsel for the opposing parties with three (3) copies of the within and foregoing Response to Petition for Writ of Certiorari by depositing same into the United States Mail, with adequate first class postage thereon, and addressed as follows:

Glenville Haldi, Esquire
Suite 100
1801 Peachtree Road, N.E.
Atlanta, Georgia 30309

William Lewis Spearman, Esquire
Suite 2500
230 Peachtree Street, N.W.
Atlanta, Georgia 30303

This 19 day of January, 1989.

TOM PYE,
Attorney for Respondents
Georgia Bar No. 590400